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Fidelity In The Law: From The Bronxdale Houses To The Bench

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I. INTRODUCTION

The criminal justice system in this country is well established. It is formally enshrined in The United States Constitution through the Fourth, Fifth, Sixth and Fourteenth Amendments. Supreme Court Justice Sonia Sotomayor has a long history of working in the criminal justice system both as an Assistant District Attorney (ADA) in New York, as a judge for the Southern District of New York (S.D.N.Y.) and as a judge for the Second Circuit Court of Appeals.

This paper will start with a biography of Justice Sotomayor, and then will discuss her judicial style on the bench, and how that is related to who she is as a person, her previous professional experiences, and what she personally believes in. From there, this paper will discuss her judicial style through a case regarding standing, *Mohamad v. Palestinian Authority*[1], and then by focusing on her judicial style through a criminal law and procedure lens. Throughout this paper, both Justice Sotomayor's judicial style, and my theory that she sometimes appears to use her experience working in criminal law to help her decide some of the cases. This paper will then conclude by highlighting that as a Supreme Court Justice, in her short tenure on the Court thus far, she has been able to thoroughly demonstrate her judicial style in the short time she has been on the bench. Additionally, this paper will restate the theory that when she departs from her established judicial style, it appears that she supplements her theory with her personal knowledge and experience of the criminal justice system.

II. BIOGRAPHY

Justice Sotomayor was born on June 25, 1948 in a small area of the Bronx, which at that time was like a little part of Puerto Rico in New York[2]. She grew up in two juxtaposed communities—the vibrant, colorful, family-oriented corner of the South Bronx, where her family

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[1] *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702 (2012).
[2] Sonia Sotomayor, My Beloved World.

and family friends all lived within blocks of one another, in various tenements, and then later the Bronxdale Projects; and her schooling at the Blessed Sacrament Catholic school run by Father Dolan and Sisters of Charity, implementing discipline and rigor in every action taken at school. While still in elementary school, there were two principle events that made a lasting impression on her life. When she was eight, she was diagnosed as a diabetic, which required her to learn how to self-administer shots of insulin so that it wouldn't be another point of argument between her parents. The second, just a year later, was when her father passed.

After elementary school, she attended high school at Cardinal Spellman High School where she excelled academically during the year, and took odd jobs during the summer. After high school, she earned her bachelors in history from Princeton University graduating summa cum laude. The summer before she started at Yale Law School, she married her high school sweetheart Kevin Noonan. While at Yale, she was the editor of the Yale Law Journal and graduated in 1979.

After graduating from law school, Justice Sotomayor worked as an NY County Assistant DA in the trial division, and she stayed with the NY County DA's office for five years, litigating her highest profile case in 1983. During this time, she was also heavily involved in various public service organizations. In 1980, she was nominated to the Puerto Rican Legal Defense and Education Fund board of Directors (PRLDEF), only a year out of law school, and seven months into her career.

In 1984, again two more events happened that changed her life. She got a divorce from her husband, at that time a student Princeton and she left the DA's office to enter private practice, where she was an associate of Pavia & Harcourt. While there, she worked primarily in IP law, going after merchants who sold counterfeit replicas of the products of her customers. A

year after starting at Pavia, Justice Sotomayor participated in another public service organization, by serving on the board of the Maternity Center Association in Manhattan for two years in 1985 & 86. While at Pavia, one of her biggest clients was Fendi, and one day while in Chinatown, she chased a counterfeit Fendi dealer, following them to their warehouse where there were hundreds, if not thousands of counterfeit Fendi bags throughout the warehouse. Four years after working at Pavia & Harcourt, she was elected to membership as a partner. Even though she was elected to a membership as a partner, when two of the partners—George Pavia and Dave Botwinik informed her of the vote of the current partners, they told her that they knew she would be on the bench one day, possibly even the US Supreme Court.

In 1991, their prediction came true when Justice Sotomayor was nominated to the Southern District of New York by President George H.W. Bush. In August of 1992, she was confirmed to the bench by a unanimous vote, making her the youngest judge in the Southern District. When confirmed, she was not only the youngest judge on the federal bench, but she was one of seven women, and the first Puerto Rican woman to serve as a judge in federal court.

A mere five years into her judgeship, Justice Sotomayor was nominated to the Second Circuit Court of Appeals by President Bill Clinton. Although her nomination and confirmation process was not as smooth as the first, she was confirmed to the Court of Appeals in October of 1998. Although it was originally voiced by some democrats in 2005 for Justice Sotomayor to be nominated to the Supreme Court due to the vacancy created by Justice O'Connor, it wasn't until May of 2009 that she was nominated to the Supreme Court to fill the vacancy that was created when Justice Souter retired. She was confirmed by the Senate and appointed to the bench in July of 2009, becoming the first Hispanic Woman to serve on the United States Supreme Court.

III. JUDICIAL STYLE

Through her years as a judge, she developed a judicial style, which she coined as "fidelity in the law." Fidelity in the law is a three-pronged analysis that she has used in the majority of her opinions, concurrences, and dissents that she has authored while on the Court. However, this paper also asserts the theory that in some cases, she supplements her judicial style with her personal knowledge and experience about the criminal justice system.

The three prongs that make up her judicial style are: to interpret the constitution according to its terms; interpret statutes according to their terms; and hewing faithfully to precedents established by the Court[3]. It is because of this three-pronged evaluation, and the theory that she utilizes personal knowledge regarding the criminal justice system to supplement her theory, that her judicial style is unique. Instead of adhering to one of the standard types of judicial styles of textualism, originalism, or judicial activism, she seems to have created her own style that deviates from the three well-established traditional styles.

IV. JUDICIAL STYLE SEEN THROUGH A STANDING CASE

A standing case is one of the most central and seemingly basic types of cases that is evaluated by a court. This is demonstrated through the fact that at the forefront of all cases is the pivotal issue of whether the parties have the ability to make their argument in the court they are in. To this, there is a requirement that there be a an injury to the party bringing suit, and that the court must have the proper jurisdiction to hear the case that is being brought before them. Regardless of the issues raised in a given case, if the parties do not have standing, then their case will not be able to be adjudicated by the judge of the court they are in. Due to the pivotal role that a standing case has to the American jurisprudence system, this paper begins with evaluating a standing case because in it, she clearly demonstrates her judicial style.

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[3] Opening Statement by Judge Sonia Sotomayor Before the Senate Judiciary Committee: Hearing on Confirmation of Supreme Court Nominee Sonia Sotomayor Before the Senate Judiciary Committee, 11th Congress (2009) (Transcript of Opening Statement by Judge Sonia Sotomayor).

In 2012, Justice Sotomayor issued the decision of the court in *Mohamad v. Palestinian Authority*. In this case, the court held that under the statute under which Mohamad was seeking relief, the Palestinian Authority, as an organization rather than an individual was not able to be sued. Mohamad was a relative of the now deceased Azzam Rahim. Rahim, a naturalized American citizen, while on a trip to the West Bank in 1995, was imprisoned, tortured and killed while in the custody of the Palestinian Authority[4]. Mohamad sued under the Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. §1350 (2013)[5]. Under the TVPA, a petitioner can bring a cause for action against *an individual* for acts of torture, or the killing that is a result of such torture under explicit or implied authority of any foreign entity[6]. In this case, the court held that Mohamad did not have standing to sue the Palestinian Authority because the organization does not count as an individual for purposes of the statute[7].

In making this decision, Justice Sotomayor uses her three-prong approach of fidelity in the law to determine whether if Mohamad had the authority to assert jurisdiction over the Palestinian Authority, giving Mohamad the necessary standing to sue under the TVPA[8]. In this case, there was a federal statute which was the determining factor in deciding if the petitioners had standing to sue the Palestinian Authority. Understanding this, Justice Sotomayor evaluated the relevant statute involved. In doing this, while she did not utilize all aspects of her three-pronged approach, her approach to the case still demonstrates her judicial style. In interpreting the statute at issue in this case, Justice Sotomayor first evaluated the statute, looking for ambiguous terms in the statute. The statute at issue did not directly define "individual," which helped in Justice Sotomayor coming to the conclusion that in this statute, "individual" was an

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[4] *Mohamad*, 132 S. Ct. at 1705(2012).
[5] Torture Victim Protection Act §1350, 28 U.S.C. §1350 (2013).
[6] *Mohamad* at 1705 [emphasis added].
[7] *Id.* at 1705.
[8] *Id.* at 1706.

ambiguous term which would be the determining factor of if the petitioners had the requisite standing to proceed with their case. Since the statute did not directly define the term, Justice Sotomayor first relied on the dictionary meaning of the word individual, and interpreted the statute to mean that "individual" was only in reference to a individual person, as is commonly understood in the vernacular of the word. By taking this approach, Sotomayor demonstrated her judicial theory through the third prong—hewing faithfully to precedents established by the Court by adhering to the precedent previously established by the court in regards to ambiguous terms.

The first case she cites to in evaluating the case law is *FCC v. AT&T*[9], , which held that when a statute does not explicitly define a term, then its ordinary meaning should be the point of reference for the term[10]. Justice Sotomayor used the dictionary definition of the word individual to mean "a person." The second case Justice Sotomayor relied on in regards to following the clearly established precedent of the court was *Goodyear Dunlop Tires Operations, S.A. v. Brown*[11], which demonstrate that when a term that has a common usage is used in a way that can be ambiguous, that it is standard to use the common usage meaning of the term[12]. To this, Justice Sotomayor noted that the everyday, or common usage of the term individual is to highlight a difference between a person and a corporation or organization[13]. It is because of this, that the court held that because the statute at issue only gave the court the authority to assert jurisdiction over an "individual"—which the Court held is only applicable to a naturalized person, that the petitioners in this case did not have the standing to assert their claim in Court.

In deciding this case, by relying not only on the statute under which the claim was originally made, but by also evaluating the relevant case law that was previously established by

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[9] *FCC v. AT&T*, 131 S. Ct. 1177 (2011)
[10] *Mohamad* at 1706.
[11] *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011).
[12] *Mohamad* at 1707.
[13] *Id.*

the court, Justice Sotomayor utilized two of the three prongs of her judicial style. *Mohamad* aptly demonstrates Justice Sotomayor's evaluative technique that is at the heart of her judicial style. While she did not fully utilize all three aspects of her judicial style, that is because it was not necessary because there was no Constitutional issue that needed to be interpreted in this case. By clearly evaluating the relevant statute and the case law together, Justice Sotomayor clearly and efficiently reached the conclusion that perfectly aligned with the history of the court, while utilizing her distinct judicial style.

While a standing case is just one type of a case that a Justice is called on to address, in *Mohamad*, Justice Sotomayor clearly adhered to her three-pronged judicial practice. This adherence to her judicial practice is exemplified in many cases, but below is a discussion of criminal cases in which she wrote an opinion, a concurrence, or a dissent to demonstrate her judicial style. As previously stated, in the proceeding evaluations, this paper will also assert he hypothesis that Justice Sotomayor sometimes brings in her personal knowledge and experience in evaluating cases, which while not explicitly stated, is apparent in some of the cases that she writes for.

V. JUDICIAL STYLE DEMONSTRATED IN CRIMINAL CASES

A. Fidelity in the Law in Criminal Law Opinions

As a Supreme Court Justice, Sotomayor has written many opinions in the field of criminal procedure. Through all of these opinions, it is clear that she does her best to stick to her overall goal of approaching each case while concentrating on her three-prong analysis described by her judicial style. However, while it is her primary goal to be neutral and not let her personal opinions or experience taint her judgment, it appears that she sometimes relies on and utilizes her personal knowledge and experience in evaluating her three prong analysis. There are a series of

opinions that are authored by Justice Sotomayor that demonstrate her ability and style of sticking to her three pronged judicial style as she described it when she spoke during her confirmation hearings. The cases discussed in this case are: *Wood v. Allen*[14]; *J.B.D. v. North Carolina*[15]; *Evans v. Michigan*[16]; *Missouri v. McNeely*[17]; and *Moncrieffe v. Holder*[18]. In each of these cases, Justice Sotomayor utilized her there-prong analysis, but in some cases she also demonstrates the theory espoused in the paper—that she sometimes supplements her three-prong theory with her personal knowledge and experience.

1. Sotomayor Upheld her Fidelity in the Law Judicial Theory Demonstrated In Wood v. Allen

After being confirmed to the Court, the first criminal procedure decision that Sotomayor wrote for was *Wood v. Allen*, in which for the first time as a Supreme Court Justice, she employed her two-thirds of her three-prong "fidelity in the law" approach. In *Wood*, the Court evaluated a habeas corpus petition for a prisoner who was seeking post conviction relief under an ineffective assistance of counsel claim stating that his counsel failed to raise evidence of his mental instabilities. In raising this claim, Wood asserted both a 28 U.S. C. §§2254(d)(2) and 2254(e)(1) claims under the Antiterrorism and Effective Death Penalty Act (AEDPA) Act. In making the evaluation regarding this claim, Sotomayor only utilized two-thirds of her three-prong system. In *Wood*, there was no constitutional issue, so in evaluating the two-prong analysis the Court looked to the statutes that were at issue and the previous case law that directly related to previously heard AEDPA cases. Under AEPDA, §2254, for a case to be evaluated fully by the Court, first all state remedies available to the petitioner must be exhausted.

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[14] *Wood v. Allen*, 558 U.S. 290 (2010)
[15] *J.B.D. v. North Carolina*, 131 S. Ct. 2394 (2011)
[16] *Evans v. Michigan*, 133 S. Ct. 1069 (2013)
[17] *Missouri v. McNeely*, 133 S. Ct. 1552 (2013)
[18] *Moncrieffe v. Holder*, 133 S. Ct. 168 (2013)

However, even if all the state based claims are not exhausted, if there was an unreasonable determination made by the state court proceeding, then the petitioner has the ability have their habeas corpus petition granted certiorari by the Court. In *Wood*, the Court evaluated whether or not Wood fully executed all of his available state-based claims, and made a determination regarding whether there was an unreasonable determination made by the state court. In the application for certiorari, Wood raised two different issues to the court—AEDPA §2254(d)(2) and 2254(e)(1). *Wood* is a case that applied for certiorari to the Supreme Court from the Eleventh Circuit, and so to this, the court looked to the decision of the Appeals Court to determine if, based on the text of the statute being relied on, the case was properly decided. In addressing the two issues raised, the Court found that the Eleventh Circuit properly addressed the issue, and there was no unreasonable determination by the reviewing state court. The Court held that in addition to the fact that the proceeding court did not make any unreasonable determinations, that the additional claim asserted by Wood—ineffective assistance of counsel was a meritless one. Under the three-prong approach to case evaluation, after evaluating the statute, Sotomayor evaluated the relevant precedent of the Court before issuing the Court's decision on the case. It was through evaluating both AEDPA and the precedent, that Sotomayor issued a decision in the case that fell under the auspices of her judicial theory of "fidelity in the law."

AEDPA is the Federal Act under which prisoners may bring federal habeas corpus claims so that they have the opportunity to have some post-conviction relief. Wood issued a claim under §§2254(d)(2) and 2254(e)(1)[19]. The text of §2254(d)(2) states:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any

[19] Federal Habeas Corpus, State Custody Remedies in Federal Courts §2254, 28 U.S.C. §§2254(d)(2) and 2254(e)(1)(2013),

> claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[20]

Under this statute, when a claim is made, the reviewing court analyzes the original state decision, and then makes a determination about whether or not the original state decision was made correctly. In this case, the District Court for the Northern District of Alabama granted Wood's petition, and held that the court-appointed attorneys in Wood's original case were ineffective by not fully evaluating his potential mental disability. This decision was appealed to the Eleventh Circuit, which overturned the decision of the District Court. After this decision, the petitioner then applied for certiorari to be granted by the Supreme Court. The Supreme Court granted certiorari to evaluate the relationship between §2254(d)(2) and §2254(e)(1). In addition to holding that the decision of the state Court was not an unreasonable determination, the Court held that the attorney appointed to Wood was not ineffective assistance of counsel. It is because of these two determinations, that the Court decided that the evaluation of Wood's case would end with a §2254(d)(2) determination, and to not make an evaluation based on §2254(e)(1).

In addressing the relationship between the two sub-sections of §2254 that were raised in Wood's petition for relief, Justice Sotomayor looked at both the meaning of the statute, and previous precedent of the Court for guidance. To make the determination about whether or not the decision made by the state court—to not allow evidence or pursue a line of questioning that would have led a jury to conclude the Wood suffered from mental deficiencies was a reasonable determination based on the facts presented—Justice Sotomayor looked to *Williams v. Taylor*[21]. This case held that while unreasonable is difficult to define, a decision made by a state court is not unreasonable just because the reviewing federal court would have reached a different

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[20] *Wood v. Allen*, 558 U.S. at 293 (2013).
[21] *Williams v. Taylor*, 529 U.S. 362 (2000).

conclusion. Sotomayor went on to cite to *Rice v. Collins*[22], in which the Court reversed the Ninth Circuit's decision that the state court decision was unreasonable. In this, she demonstrated deference to both the statute at issue and the precedent established by the court, which is the goal of her three-pronged analysis. In *Wood*, the Court held that the state court determination that the attorneys made a strategic decision to not assert a mental instability defense or bring up instances of Wood's mental deficiencies, and that because that decision was not unreasonable under the language of the statute, and the precedent established by the Court, they affirmed the decision of the Eleventh Circuit. In regard to the other claim under §2254, that was raised by Wood in his petition, the Court held that there was no need to address that claim because there is no claim to be asserted, even under the way that Wood read § 2254(d)(2), that a discussion of § 2254(e)(1) is barred by the statute.

The reason the Court held that a discussion of §2254(e)(1) was barred by statute is because all of the requirements under §2254(d)(2) were not fulfilled. Under the statute, §2254(e)(1) can only be addressed by the Court when the requirements of §2254(d)(2) are fulfilled completely. Without the previous statutory requirements being completely fulfilled, the Court cannot address the issues raised under §2254(e)(1).

2. Sotomayor Upheld her Fidelity in the Law Judicial Theory Which is Demonstrated Through J.B.D. v. North Carolina

In 2011, Justice Sotomayor wrote the decision for a court with a narrow majority, answering the question of whether a person's age has an impact on whether they are in custody for Miranda purposes. In *J.D.B.*, the Court granted certiorari to resolve the issue presented of whether a child's age is an aspect to be considered when the court is making a decision on

[22] *Rice v. Collins*, 546 U.S.333 (2006),

whether or not a person was in custody for purposes of a *Miranda* evaluation.[23] In *J.D.B.*, a seventh grader was escorted out of class by a uniformed officer, then taken to a conference room where the officers questioned him about a few robberies that had taken place in a nearby neighborhood.[24] Once in this room, J.D.B. and the officer were joined by two administrators from his school, and an additional police officer.[25] The officers asked him questions regarding the reason why he was in the neighborhood where the break-ins occurred, and after not directly informing the officers or school administrators why he was there, one of the officers stated that he may go to juvenile detention for the stealing of the goods.[26] It was only after learning about the prospect of being sent to juvenile detention that J.D.B. confessed that he and an acquaintance were responsible for the break-ins in the neighborhood.[27] After confessing, the officers informed J.B.D. that he was free to leave, and that if he wanted to, he could refuse to answer any of the questions that he is or was asked.[28] After the meeting was over, J.D.B. took the bus home that day.[29] Throughout the questioning, his grandmother, his legal guardian, was never called, and he was not permitted to speak to her[30]. At trial, the court declined J.D.B.'s motion to suppress the statements that were given to the officers because they disagreed with the assertion that J.D.B. was subject to a custodial interrogation.[31] The North Carolina Court of Appeals affirmed the decision of the district court that held that the age of an individual being questioned is not determinative in addressing whether or not a person is being held custodially[32]. The Supreme Court granted certiorari to resolve the question of whether or not a person's age should be

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[23] *J.B.D.* at 2398.
[24] *Id.* at 2399.
[25] *Id.*
[26] *Id.*
[27] *Id.* at 2400.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.* at 2400.
[32] *Id.*

included in a *Miranda* analysis to determine if a person was subjected to a custodial interrogation[33]. The Court overturned the decisions of the previous courts, holding that age is a factor in a *Miranda* decision[34]. To make the decision regarding whether or not J.D.B. was in custody, or if a youth's age in general should be a factor in a *Miranda* evaluation, Sotomayor broadly utilized her three prong analysis, while specifically focusing on the precedent previously established by the Court.

In reviewing the case *de novo*, Sotomayor relied on previously established case law, utilizing five previous cases, in which the court has made decisions regarding the *Miranda* evaluations. Sotomayor utilized the analyses in these various cases like puzzle pieces to put together the puzzle that created the decision of the Court. The six cases that Sotomayor used were *Thompson v. Keohane*[35], *Dickerson v. United States*[36], *Stansbury v. California*[37], *Eddings v. Oklahoma*[38], and *Betollit v. Bush*[39].

When evaluating the case law, and the case in front of the Court, because it was being reviewed *de novo*, the Court evaluated the case before them as a two-prong analysis to answer the central question of the case of was J.D.B. subjected to a custodial interrogation. The first prong the court addressed was whether or not J.D.B. was held cusotidally when he was questioned, and if he was asked questions in a style that was similar to a custodial interrogation.

To answer these questions, citing to *Thompson*, the Court stated that in determining the answer to their question of whether J.D.B. was subjected to a custodial interrogation were by looking at the circumstances that surrounded in interrogation and to make a determination if a

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[33] *Id.* at 2401.
[34] *Id.*
[35] *Thompson v. Keohane*, 516 U.S. 99 (1995).
[36] *Dickerson v. United States*, 530 U.S. 428 (2000).
[37] *Stansbury v. California*, 511 U.S. 318 (1994).
[38] *Eddings v. Oklahoma*, 455 U.S. 104 (1988).
[39] *Betollit v. Baird*, 443 U.S. 622 (1979

reasonable person, in the same circumstances would heave believed that they were free to leave.[40] Additionally, the Court cited to *Dickerson*, stating that when a person is subjected to a custodial interrogation, there is a "heightened risk" to the statements made during the confessions because of the pressures surrounding a custodial interrogation.[41]

In this case, the issue was not just if a person was subjected to a custodial interrogation, but if the determination of that, should their age be a factor. To answer this question, the Court cited to *Stansbury*, stating that a child's age has an impact on how a reasonable person would have perceived their ability to leave.[42] Additionally, the Court cited to *Eddings*, stating that children are more susceptible to influence than adults[43], and that this difference makes it such that evaluating a child's age is necessary to determine if they believed they were free to leave. Last, citing to *Betollit*, the Court reiterated the holding that a child often doesn't have the requisite experience and perspective to recognize and when possible, avoid decisions which may be detrimental to them later.

Utilizing the aforementioned cases, Sotomayor asserted the holding that yes, a child's age should be a factor when making a determination regarding whether or not a person is being held and subjected to a custodial interrogation. In *J.D.B.*, he was held in a room at the school, but was not able to talk to his legal guardian, and the officers did not inform J.D.B. that he was free to go at any time or that he did not have to answer their questions until the interrogation was over. to the conclusion that in this case based on the facts and established case law that because of his age and mentality, J.D.B. was held for purposes of a custodial interrogation. More poignantly, the Court issued a new rule which expressed the idea that a person's age should

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[40] *J.DB.*. at 2402.
[41] *Id.* at 2401 (citing *Thompson v. Keohane*, 516 U.S. at 112 (1995)).
[42] *Id.* at 2403 (citing *Dickerson v. United States*, 530 U.S. at 435 (2000)).
[43] *Id.* at 2405 (citing *Eddings v. Oklahoma*, 455 U.S. at 115 (1988)).

inform a reviewing court's *Miranda* analysis. Specifically, Sotomayor stated "....so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test.[44]"

In the evaluation of this case, Sotomayor used her three prong analysis by evaluating the impact of the Constitution on her decision, because it was a Fifth Amendment case, and by looking at the relevant case law that spoke to the question that was presented to the Court. Under the Fifth Amendment, a person cannot be forced to incriminate themselves. However, based on the actions of the officers and school administrators in this case, that is what J.D.B. was forced to do when he was held custodially. In this case, Sotomayor also utilized her approach through evaluating the established case law, which when evaluated all together demonstrated that there was a recognizable difference between the mental acuity of an adult and a child. Furthermore, by evaluating the case law, Sotomayor demonstrated that this difference is such that when there is a reasonable person standard, or test that is utilized in a given case, the age of the person must be taken into consideration. It is alluded to that the reason why this is so is because a child is more impressionable and is more likely to believe that they are being held in such a way that they don't have the freedom to leave in a situation where an adult would not feel the same thing. In reaching this conclusion, Sotomayor demonstrated her fidelity in the law approach to evaluating the facts to the law as they were presented to her.

3. Sotomayor Upheld her Fidelity in the Law Judicial Theory Which is Demonstrated Through Evans v. Michigan

In 2013, Justice Sotomayor authored the opinions for three successive criminal procedure

[44] *J.D.B.* at 2408 (2013)

cases. The first of these cases is *Evans v. Michigan*[45], in which the Court granted certiorari to resolve the question regarding whether an improper mid-trial acquittal is still an acquittal for the purposes of the Fifth Amendment protection against double jeopardy.

In *Evans*, the defendant, Lamar Evans was acquitted of the arson charge that was brought against him when his attorney moved for a directed verdict by stating that the court did not prove all elements of the crime—namely that the fourth element of the offense with which Evans was charged, that the structure that was burned be a dwelling, was not proved by the state[46]. The trial court granted the motion, and Evans was acquitted of the charges before the defense presented their case-in-chief[47]. The state of Michigan appealed this decision, and the Michigan Court of Appeals reversed and remanded the decision back to the appeals court citing that the crime Evans committed was a lesser-included offense, and that proving the greater charge was not required[48]. The Supreme Court of Michigan affirmed the decision of the Court of Appeals on appeal, holding that because the mid-trial acquittal was based on an error-of-law, that it was not an acquittal for the purpose of double-jeopardy protection as guaranteed under the Fifth Amendment[49].

In *Evans*, the Court issued a holding stating that when there is an acquittal, even if it was because there was an error in the application of the law by the court, it is still an acquittal and the defendant is barred from being retried. In deciding whether or not an error in the application of the law bars a state from retrying a defendant after they have been acquitted due to the error, Sotomayor employed her standardized three-prong analysis. As with her decision in *J.B.D.*, when deciding this case, because it is a case whose controversy rises from one of the

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[45] *Evans v. Michigan*, 133 S. Ct. 1069 (2013).
[46] *Evans* at 1073.
[47] *Id.*
[48] *Id.* at 1073.
[49] *Id.*

Amendments of the Constitution, she looked to the established Supreme Court precedent that specifically addressed the issue. In *Evans*, Sotomayor primarily cited to four different cases: *Ball v. United States*[50]; *Fong Foo v. United States*[51]; *United States v. Scott*, 437 U.S. 82 (1978)[52]; *United States v. Martin Linen Supply Co.*[53]; and *Green v. United States*[54].

In *Ball*, the Court held that even an insufficient acquittal is an acquittal for the purposes of the Double Jeopardy Clause. In *Fong Foo*, the court held that even when there is an error in the decision made by the district judge which led to an acquittal, that the Double Jeopardy Clause bars retrial of the same defendant on the same facts. In relying on these cases, the court held that even when there is a mistake of law by the trial court in a case, when a defendant is acquitted of the crimes they were charged, the Fifth Amendment bars them being retried on the same issue. Additionally, in citing to *Scott*, which held the Double Jeopardy Clause does not bar the same charges to be brought against the same defendant when there has been a dismissal of the original charges. Another case the Court cited to in *Evans* was *Martin Linen*, in which the Court held that an acquittal is achieved when there is a ruling by the court that the proof offered by the prosecution to prove their case is found to be insufficient. Using all of these cases, the Court reached the conclusion that while there was an error of law, because *Evans* was acquitted by the district court, a retrial was barred by the Double Jeopardy Clause.

The last major case cited to in *Evans* was *Green*, in which the Court held that when a defendant is charged and then convicted of a lesser charge, they cannot be retried on the higher charge that they were acquitted of during the first case because that proceeding is barred by the Double Jeopardy Clause. Citing to *Green*, Sotomayor stated it is imperative that the double

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[50] *Ball v. United States*, 163 U.S. 662 (1986).
[51] *Fong Foo v. United States*, 369 U.S. 141 (1962)
[52] *United States v. Scott*, 437 U.S. 82 (1978)
[53] *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977)
[54] *Green v. United States*, 355 U.S. 184 (1957)

jeopardy clause be respected, which not only bars a retrial of an issue, but also bars the state that was originally prosecuting the case from appealing the ruling that created the original acquittal[55]. In *Green*, the Court held that because the government invariably has more resources than the majority of defendants that it tries, that to retry a defendant after they had been acquitted, there is a greater chance that a factually innocent defendant may be found guilty.

4. Sotomayor Upheld her Fidelity in the Law Judicial Theory Which is Demonstrated Through Missouri v. McNeely

In *Missouri v. McNeely*, the Court addressed the per se exigency that is required for the Fourth Amendment warrant requirement to be waived, specifically in relation to the testing for blood alcohol levels[56]. In *McNeely*, the Court addressed the issue of whether the natural dissipation of alcohol in a person's blood create such an exigency under the Fourth Amendment that it permits an intrusive warrantless search. In addressing this issue, the Court held that no, the natural dissipation of alcohol does not rise to an exception under the exigency standard that would not require a warrant to be secured before extracting a person's blood. In granting certiorari on this case, the Court sought to resolved a split in the circuits regarding the dissipation of alcohol in a person's blood and if that creates an exigency under the Fourth Amendment.

In *McNeely*, unlike in the Fifth Amendment cases, Sotomayor employed all three aspects of her three prong judicial approach. In this case, Sotomayor looked at the United States Constitution, the local statute in Missouri, under which McNeely was originally charged, and the relevant precedent from both the Missouri and United States Supreme Court. In *McNeely*, the Court looked to almost a dozen cases, of which five can be used to demonstrate the way that Sotomayor utilized her three-prong approach to deciding a case. The five cases that can be used

[55] *Id.* at 1075.
[56] *McNeely* at 1556 (2013)

to demonstrate Sotomayor's approach were: *United States v. Robinson*[57]; *Schmerber v. California*[58]; *Brigham City v. Stuart*[59]; and *Tennessee v. Garner*.[60] However, before approaching the caselaw, Sotomayor first discussed the Fourth Amendment and relevant Missouri case law. Citing to *Robinson*, the Sotomayor stated that for a warrantless search to be reasonable, the search must fall within one of the established exceptions.

This was a case whose original jurisdiction was Missouri, and it is because of this, that Sotomayor evaluated the statute under which McNeely was charged in addition to the larger Constitutional issues and relevant case law that was presented. After addressing the state statute, the Court looked to the text of the Fourth Amendment to start its evaluation of what is protected by the Fourth Amendment. After granting certiorari, the court held that the natural dissipation of alcohol in a person's blood does not create an exigency that would allow for a warrantless search of a person.

In evaluating the case law, the Court cited to *Robinson*, which highlighted the fact that without an established exception to the Fourth Amendment, a warrantless search is illegal. The court also looked to and differentiated *McNeely* from *Schmerber*, which directly addressed the issue of alcohol levels in a suspect's blood dissipating over time. In differencing the two cases, the Court highlighted that in *Schmerber*, based on the totality of the circumstances[61] that surrounded the warrantless blood test, a warrantless blood draw was allowable, but that the circumstances in *McNeely* did not present such a case[62]. In *McNeely*, the Court concluded that *Schmerber* required investigation of an accident, for which Schmerber's level of intoxication at

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[57] *United States v. Robinson*, 414 U.S. 218 (1973).
[58] *Schmerber v. California*, 384 U.S. 757 (1966).
[59] *Brigham City v. Stuart*, 547 U.S. 398 (2006).
[60] *Tennessee v. Garner*, 471 U.S. 1 (1985).
[61] See *Brigham City* at 406, stating that in making a determination to whether an exigency exits, the Court makes the decision based on a totality of the circumstances.
[62] *McNeely* at 1557 (citing *Schmerber*, 384 U.S. 757(1966)).

the time of the accident created an exigency that was not present in *McNeely*[63]. While still citing to *Schmerber*, the Court in *McNeely* stated in *Schmerber* the technology at the time helped to create the exigency because when *Schmerber* was decided, the delay in getting a warrant was so great that all the alcohol from a person's blood could dissipate in that time.[64] Additionally, the Court reasoned, in today's world, officers can and often get e-warrants which are acquired much quicker than the traditional paper warrants that were prevalent when *Schmerber* was decided.[65]

Citing to *Garner*, the Court stated that compelled blood draws, unlike other type of searches have a greater privacy interest.[66] Additionally, the Court stated that its ruling in *McNeely* would not hamper the police from being able to perform their duties and stop and arrest people for driving under the influence.[67]

Here, Sotomayor utilized her three-prong analysis by evaluating the implications of the Fourth Amendment, the Missouri statute under which McNeely was convicted and the case law to support her holding. This case is a good example of her three-pronged analysis because it thoroughly demonstrates her judicial style in a straightforward manner.

5. Sotomayor Upheld her Fidelity in the Law Judicial Theory Which is Demonstrated Through Moncrieffe v. Holder

One of the last criminal law opinions that Sotomayor authored during the 2012 session that was in regards to criminal law and procedure was *Moncrieffe v. Holder*. In *Moncrieffe*, the Court addressed drug convictions and their relation to automatic deportability[68]. In *Moncrieffe*, the Court addressed the issue of whether a person can be automatically deported when the crime they were convicted of meets the description of either a misdemeanor or a felony under the

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[63] *Id.*
[64] *McNeely* at 1561 (citing *Schmerber*, 384 U.S. at 770-771 (1966)).
[65] *Id.*
[66] *McNeely* at 1567 (citing *Garner*, 471 U.S. at 19 (1985)).
[67] *McNeely* at 1573.
[68] *Moncrieffe*, 133 S. Ct. 168 (2013).

Controlled Substances Act (CSA).[69] The court addressed the issue of when evaluating the categorical approach to drug trafficking as outlined by the Immigration and Nationality Act (INA).[70] The issue addressed is whether a person convicted for possessing a minor amount of marijuana is guilty of an aggravated felony under the INA when the state statute under which a person is convicted does not differentiate in quantity, therefore encompassing the provisions of both the misdemeanor and felony provisions of the INA[71]. Answering the issue raised in the negative, the court held that when the state statute does not differentiate in the same manner as the INA, a person is not automatically charged with an aggravated felony, which would require them to be deported automatically.[72]

Moncrieffe is a Georgia resident Jamaican citizen who was found with a minimal amount of marijuana during a 2007 traffic stop[73]. He was convicted under the Georgia Annotated Code, under which the sentencing judge gave him a lenient sentence as a first-time offender, requiring him to complete a five-year probation, after which, his record would be expunged[74]. Under the Georgia statute, there was a possibility that Moncrieffe could have served over a year in prison.[75] As a Jamaican citizen, Moncreieffe was subjected to both the state law where he was convicted, and, if any federal or immigration laws that could have an impact on his immigration and residency status. The Georgia statute that Moncrieffe was convicted under included both trafficking and possession. Pursuant to the Controlled Substances Act (CSA), when a person is convicted of drug trafficking crime, that is punishable by more than one year's imprisonment, it

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[69] *Id.* at 1682.
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Moncrieffe* at 1683.
[74] *Id.*
[75] *Id.*

is categorized as an aggravated felony[76]. Under the Immigration and Nationality Act (INA), a person who is convicted of an aggravated felony is automatically deportable[77]. The Court granted certiorari to decide if a person is convicted under a state criminal statute for possessing a minimal amount of marijuana, can be charged with having an aggravated felony on their record for the purpose of the INA[78].

In *Moncrieffe*, using her three-prong judicial approach, Sotomayor looked to the statutes, which make up the relevant aspects pursuant to the INA and the relevant case law. In 8 U.S.C.A. §§1158, and 1229[79], the INA discusses after committing one of the offenses that would cause a person to be deported and the primary removal exceptions under the law.[80] These exceptions include asking for permission from the Attorney General for a stay of removal for due to the fact that the defendant has been present in the United States lawfully for years[81]. Pursuant to 8 U.S.C.A. §1101[82], the INA defines all of the terms used in the act, what crimes are included in as an aggravated felony[83]. In 8 U.S.C.A. §1227[84], the INA states that if a person is convicted of an aggravated felony, then they are automatically deportable, and not allowed a pardon from deportability by the Attorney General[85].

There are four cases cited to in *Moncrieffe*, each of which highlights an aspect of either a case decided under the INA or CSA, and how local statutes have been applied to cases that are deportable under the statutes. Under Sotomayor's judicial theory, the four cases highlighted are:

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[76] *Id.* at 1681
[77] *Id.*
[78] *Id.*
[79] Immigration and Nationality Act, 8 U.S.C.A. §1158 and 1229 (2013).
[80] *Moncrieffe* at 1682.
[81] *Id.*
[82] Immigration and Nationality Act, 8 U.S.C.A. §1101 (2013).
[83] *Moncrieffe* at 1682.
[84] Immigration and Nationality Act, 8 U.S.C.A. §1227 (2013).
[85] *Moncrieffe* at 1683.

Lopez v. Gonzalez[86]; *Johnson v. United States*[87]; and *Carachuri-Rosendo v. Holder*.[88]

Pursuant to *Lopez*, the Court addressed specifically that a crime, regardless of what the law is titled, is only a crime under the CSA if the state crime statute specifically delineates actions, which are punishable as a felony under federal law[89]. In *Lopez*, the court held that a state classification of a crime either as a misdemeanor or felony does not have an impact on whether or not a specific crime is categorized as an aggravated felony under the CSA.[90] Rather, the Court held in *Lopez*, that there needs to be a categorical approach to approaching cases under the CSA.[91] To meet the requirements of the categorical approach ". . . . a state drug offense must meet two conditions: It must "necessarily" proscribe conduct that is an offense under the CSA, and the CSA must "necessarily" prescribe felony punishment for that conduct.[92]" The significance of this is that the Georgia statute under which Moncrieffe was convicted does not explicitly describe the conduct that was described under the CSA felony provision. This difference demonstrates that because there is no quantity requirement delineated in the Georgia statute, it is not equivocal to the INA statute, which means that Moncrieffe could not be automatically deported under the INA.

The Court cited to *Carachuri-Rosendo*, in which the Court held that when a person is convicted of an aggravated felony under the CSA, there is no possibility that the person will be granted a stay of removal by the Attorney General.[93] The Court utilized this case to demonstrate standard rule applicable for people convicted of an aggravated felony under the CSA. However,

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[86] *Lopez v. Gonzalez*, 549 U.S. 47 (2006)
[87] *Johnson v. United States*, 559 U.S. 133 (2010)
[88] *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010)
[89] *Moncrieffe* at 1686.
[90] *Id.* at 1685
[91] *Id.*
[92] *Id.*
[93] *Carachuri-Rosendo*, 560 U.S. 563 (2010)

pursuant to *Johnson*, when evaluating whether a person's crime constitutes a felony under the federal law, it is the definition that is annunciated that makes the determination regarding whether a case is to be prosecuted under federal law as a federal felony. When these two cases are put together, as was done in *Moncrieffe*, the Court highlighted that in the dicta between *Carachuri-Rosendo* and *Johnson*, the Court in those cases stated that even if someone is not convicted of an aggravated felony, they are still convicted of a felony and can be deported. The only difference is that a person not convicted of an aggravated felony is no longer deported automatically[94]. This is the issue that was addressed in *Moncrieffe*, and it is because of the case law that Sotomayor held that the difference in the descriptions between the Georgia statute and the CSA created a situation in which Moncrieffe was not convicted of a crime which required automatic deportation.

In deciding this case, Sotomayor's three-prong analysis was not completely used because there was no Constitutional issue dealt with in the case, but she fully employed two-thirds of the three-prong analysis. In this case, her usage of her three-prong analysis was clear in her comparison and evaluation of the statutes that were the central issue in the case, as well as relying on the case law of the Court to reach the decision in *Moncrieffe*. Sotomayor's three-prong analysis is used throughout her opinions, but it is in her dissents and concurrences that it can be seen more clearly in her dissents and concurrences the theory that she supplements her three-prong analysis with personal knowledge and experience.

B. Fidelity in the Law in Criminal Law Concurrences and Dissents

In her time as a Justice, Sotomayor has authored twenty-two concurrences and twenty-seven dissents. Four of them are highlighted below. Each of the cases highlighted is a criminal

[94] *Id.* at 1687.

law and procedure case, two of which are concurrences and two of which are dissents. While not writing the majority opinion in any of the cases, Sotomayor still employed her patented three-prong judicial fidelity theory. Additionally, as was previously explained, it is my theory that she supplements her three-prong theory with her knowledge and experience regarding he criminal justice system. The four cases discussed which exemplify her three-prong approach combined with criminal justice experience are: *Davis v. United States*, 131 S. Ct. 2419, a concurrence on a Fourth Amendment search and seizure case involving a revolver; *Perry v. New Hampshire*, 132 S. Ct. 716 (2012), a dissent on a case regarding an identification of a suspect through a show-up; *United States v. Jones*, 132 S. Ct. 945, a concurrence in which the Court held the attachment of a Global Positioning System (GPS) device was illegal and therefore an illegal search and seizure against Jones pursuant to the Fourth Amendment; and *Blueford v. Arkansas*, 132 S. Ct. 2044 (2012), a dissent regarding a an implied acquittal in relation to the double jeopardy clause.

1. Sotomayor Utilized her Fidelity in the Law Judicial Theory and Her History in Criminal Law and Procedure Through Her Concurrence in Davis v. United States

In *Davis*, Sotomayor employed her three-prong system in her concurrence, in which she agreed with the holding of the Court, but not all of the dicta that forms the basis to the holding. In *Davis*, the defendant, a convicted felon, was arrested for giving a false name to officers during a routine traffic stop[95]. When arrested, Davis and the vehicle were searched, during which the officers found a revolver that belonged to Davis[96]. Davis moved to have the evidence of the gun suppressed, which was denied under the established Eleventh Circuit precedent stating the search was legal[97]. Davis, reserving his Fourth Amendment challenge to the decision, brought it up on

[95] *Davis* at 2425.
[96] *Id.*
[97] *Id.*

appeal[98]. While the case was being appealed, the Supreme Court issued the decision of *Arizona v. Gant*, 556 U.S. 332 (2009), which held that to perform a warrantless search of a vehicle, the officers must demonstrate a continued belief that their safety was threatened. On appeal, the Eleventh Circuit held that the vehicle search violated Davis's Fourth Amendment rights under *Gant*, but upheld the decision of the trial court to allow the evidence of the revolver in the case, stating the exclusionary rule did not bar evidence of the revolver to be presented[99]. The Supreme Court granted certiorari to resolve the conflict between the circuits regarding vehicle searches incident to arrest.[100].

In her concurrence, Sotomayor relied primarily on three cases, two of which were often used concurrently with one another. The three primary cases discussed were *Herring v. United States*[101], a case discussing the arresting of a defendant based on a warrant not properly being rescinded when it was supposed to have been; *Illinois v. Krull*[102], a case discussing a warranted search based on a warrant that should never had been issued because the legislative authorization behind the warrant was later found unconstitutional under the United States Constitution; and *United States v. Johnson*[103], a case in which the Court held that police cannot enter a suspects home without a warrant on a felony arrest. In these cases she primarily relied on the case law to support her findings, and it is because of this that it's the theory of this paper that she also used her personal knowledge and experience to supplement the case law to reach her conclusions.

In citing to each of these cases in her concurrence, she noted the purpose of the exclusionary rule, and the purpose of established cases to be binding both in the future and

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[98] *Id.* at 2424
[99] *Davis* at 2425.
[100] *Davis* at 2424.
[101] *Herring v. United States*, 555 U.S. 135 (2009).
[102] *Illinois v. Krull*, 480 U.S. 340 (1987).
[103] *United States v. Johnson*, 457 U.S. 537 (1982).

retroactively[104]. However, looking specifically to the exclusionary rule, Sotomayor concurs that it is not applicable in *Davis*, and it is because of that, that she concurred in the judgment that was authored by the Court[105]. In her concurrence, her opinion differs from that of the Court in that she addresses an issue that the dissent brings up that the Court does not. This issue is the issue of an officers culpability when performing in a way that has not yet been settled by existing precedent.[106] To this, Sotomayor agues that it is not the officer's culpability that is the root of the issue, but rather if their culpability has an effect on the deterrence effect of exclusion.[107] It is this difference in the issue regarding the culpability of the officer that stems the theory that Justice Sotomayor utilizes her personal knowledge and experience to supplement the case law. The reason for this is that in her concurrence, she is getting to a separate more tangible issue of officer behavior and its effect on the deterrence aspect of the exclusionary rule. I theorize that her seeing this connection in a way that her colleagues did not is because she is utilizing her personal knowledge and experience rather than just sticking to the case law that is presented.

2. Sotomayor Utilized Her Fidelity in the Law Judicial Theory and Her History in Criminal Law and Procedure Through Her Dissent in Perry v. New Hampshire

In her dissent in *Perry*, Sotomayor demonstrated her usage of her three-prong system through citing most poignantly to five cases, in addition to the case that was decided by the majority. The five poignant cases that she cited to are: *Manson v. Braithwaite*[108]; *Stovall v. Denno*[109]; *United States v. Wade*[110]; and *Neil v. Biggers*[111].

In *Perry*, the Court granted certiorari on a case that had been appealed from the trial court

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[104] *Davis* at 2435 (2013) (Sotomayor, J., concurring).
[105] *Id.*
[106] *Id.* at 2436
[107] *Id.*
[108] *Manson v. Brathwaite*, 432 U.S. 98 (1977)
[109] *Stovall v. Denno*, 388 U.S. 293 (1967)
[110] *United States v. Wade*, 388 U.S. 218 (1967)
[111] *Neil v. Biggers*, 409 U.S. 188 (1972) Holding that a reliable witness identification is not overturned simply because the officers could have used better tactics to achieve an identification from the witness

through the United States Supreme Court. In *Perry*, the defendant was convicted of theft by unauthorized taking based on the identification of Perry by a witness named Nubia Blandon, who identified him during an impromptu and accidental show up. The Court granted certiorari to resolve the difference of opinion regarding whether the Due Process Clause requires a trial judge to make an independent decision regarding the reliability of an eyewitness identification that was issued during an accidental suggestive circumstances—which in the present case, was an impromptu show up. In the decision, the Court held that accidental show ups, or broadly any type of accidental miscarriage of justice done by the officers does not create the same violation of a person's due process rights in regards to witness identification. Sotomayor, dissenting from the Court, utilized the case law and it appears that once again, used her previous personal knowledge regarding criminal law and procedure to support her conclusion. In her dissent, her conclusion was that regardless of how it happened, an impermissible witness identification due to accidental police corroboration has a direct negative correlation to the reliability of a witness.[112] She argues that this correlation is then not able to be fully articulated or addressed in court based on the decision of the Court in *Perry*[113].

In the *Perry* dissent, Sotomayor first cited to *Brathwaite*, a case in which the Court held that reliability is the cornerstone of witness testimony. Citing to this case, Sotomayor raised the issue regarding the testimony of witnesses that haven't first been assured of their reliability before they testify.[114] Additionally, she discusses the fact that when a witnesses' reliability is hampered by a possible suggestion by the officers, there is a natural hint of impropriety.[115] The issue was the impromptu show up which led to the witness identification of Perry as the man

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[112] *Perry* at 731 (2013) (Sotomayor, J. dissenting)
[113] *Id.* at 730-40.
[114] *Id.* at 731.
[115] *Id.*

who she saw breaking into cars in the parking lot below her[116]. Additionally, still citing to *Brathwaite*, Sotomayor highlighted the fact that the Court has previously held that the reliability of a witness is the prerequisite to determine if the testimony being elicited by the witness is admissible. Also from *Brathwaite*, Sotomayor discusses the issue that officers, while unintentional, may send cues to witnesses when witnesses are providing information regarding the correct perpetrator of a crime[117]. Applying that to the facts of *Perry*, Sotomayor was highlighting the fact that even if the officers did not intentionally create a situation where there would be improper police conduct creating a show-up during which the witness identified Perry as the perpetrator of breaking into cars, that it is very likely that there were cues given that impact the reliability of the witnesses identification[118].

The second case Sotomayor cited to in the *Perry* dissent was *Stovall*, a case in which the Court held that an identification should be excluded if a pretrial identification by a witness was overly suggestive to the point that it violated due process. Citing to the dicta in *Stovall*, she highlighted the fact that an eyewitness' testimony at trial is artificially inflated, therefore limiting the jury's ability to properly assess the reliability of the information being conveyed[119].

Furthermore, in her dissent, Sotomayor highlighted three factors from *Wade* that directly spoke to the administration of justice, in regards to the reliability of eyewitness testimony in court[120]. The *Wade* factors are: that a jury not be subjected to unreliable eyewitness testimony, but that the per se rule established in *Wade* suppresses too much reliable information; that the per se rule served as a deterrent to police misconduct in receiving witness identifications; and that the per se rule had numerous drawbacks regarding the administration of justice in witness

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[116] *Id.* at 734.
[117] *Id.* at 732.
[118] *Perry* at 734.
[119] *Id.* at 737.
[120] *Id.* at 736.

identification cases.

Once again, primarily relying on case law in regards to her position explained in her dissent, it is because of this that I theorize she utilized her personal knowledge and experience to supplement the case law. It is my theory that as a prosecutor, the chances are greater that she, at the very least, was witness to types of unfair lineups that weren't per se unconstitutional, but still resulted in an biased or police-influenced identification. It is because of this that it appears that she takes such a different stance from the rest of the court because in thinking of the facts of the case, she is able to apply her personal knowledge in a way that the other Justices are not.

3. Sotomayor Utilized her Fidelity in the Law Judicial Theory and Her History in Criminal Law and Procedure Through Her Concurrence in United States v. Jones

During the 2012 Session, Justice Sotomayor wrote a concurrence in which she citied to numerous cases which demonstrate her three prong judicial approach, in addition to her reliance on personal knowledge and history based on her experience working in criminal law and procedure. In *Jones*, the Court granted certiorari to resolve the split in opinion of the circuit courts regarding the attachment of a GPS monitoring device to a vehicle in a public parking lot, which was then used to monitor their locations so that the state could receive information regarding a possible connection to narcotics trafficking in the District of Columbia (D.C.) metro area.[121] In *Jones*, the defendant was suspected of participating in narcotics trafficking in D.C., and to combat this trafficking, the FBI and Metropolitan Police Department (MPD) obtained a warrant that authorized them to attach a GPS system to Jones' wife's car, from which they would monitor the activity of the vehicle[122]. When authorizing the warrant, the court gave the FBI and MPD ten days to attach the GPS system, within the boundaries of D.C. On the eleventh day after the warrant was issued, in a public parking lot in Maryland, the FBI attached the approved GPS

[121] *Jones* at 948.
[122] *Id.*

device on the bottom of the car[123]. While the GPS device was attached to the car, there was evidence gathered that supported the charges addressing narcotics trafficking that were brought against Jones[124]. After formal charges were brought against Jones, he was indicted by a grand jury, after which he was tried for conspiracy and convicted by a jury in the D.C. District Court[125]. The case was appealed to the D.C. Federal District Court, which reversed the conviction stating that the evidence that was obtained was a result of a warrantless search[126]. The government then appealed that decision to the D.C. Circuit Court, which denied the petition issued by the Government to have a rehearing en banc.[127] The Supreme Court granted certiorari to resolve the issue regarding the gathering of evidence based on a search that was the result of an expired warrant[128]. In resolving the issue, the Court held that information gathered from the placement of a GPS device to the undercarriage of a car constitutes a search.[129] While she did not agree thoroughly with the dicta of the opinion, Sotomayor agreed in the holding of the case, and issued one of her seven concurrences of the 2011 term.

In her concurrence, Justice Sotomayor cited to the Court's opinion in which Justice Scalia enunciated that under the protection guaranteed by the Fourth Amendment, there is a search when the government obtains information as a result of impeding on a protected area[130]. Additionally, Sotomayor cited to a dozen cases, two of which will be highlighted in addition to the aforementioned Constitutional interpretation regarding the protections guaranteed under the Fourth Amendment. The two primary cases that will be discussed are *Smith v. Maryland*[131], and

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[123] *Id.*
[124] *Id.*
[125] *Id.* at 948.
[126] *Id.*
[127] *Id.* at 949.
[128] *Id.*
[129] *Id.*
[130] *Jones* at 954-57 (Sotomayor, J., concurring)
[131] *Smith v. Maryland*, 442 U.S. 735 (1979).

United States v. Knotts.[132]

Citing to *Smith*, Sotomayor noted that a search under the Fourth Amendment is carried out illegally when the "government violates a subjective expectation of privacy that society recognizes as reasonable."[133] Additionally, while citing to *Miller* further in her concurrence, Sotomayor enunciated the fact that while it was once a standard holding, a person may have an expectation of privacy even for information that is voluntarily disclosed to third parties[134]. In her concurrence, Sotomayor also cited to *Knotts*, which stated that when the government creates a physical intrusion into space that is protected by the constitution, there is a probability that there is a violation of protected Fourth Amendment rights.[135] In addition to the aforementioned cases, Justice Sotomayor highlights in her concurrence that she agrees with Justice Alito regarding the fact that the attachment of the GPS device was an intrusion on a reasonable expectation of privacy.[136]

In her concurrence, Sotomayor utilizes two-thirds of her three prong approach by first evaluating the meaning of a search under the Fourth Amendment, and then using caselaw to support her difference of opinion in dicta from the majority.[137] It is in this concurrence that she is able to once again demonstrate her judicial theory of fidelity in the law through combining the text of the Constitution and the established case law of the Court.

4. Sotomayor Utilized her Fidelity in the Law Judicial Theory and Her History in Criminal Law and Procedure Through Her Concurrence in Blueford v. Arkansas

The last case to be discussed is *Blueford*, in which Sotomayor issued a dissent, balking at the Court's approach to the double jeopardy standard. In *Blueford*, the Court granted certiorari

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[132] *United States v. Knotts*, 460 U.S. 276 (1983).
[133] *Jones* at 955. (Sotomayor, J., concurring)
[134] *Jones* at 958.
[135] *Jones* at 955.
[136] *Id.*
[137] *Id.* at 954

to resolve the issue regarding a non-specified acquittal being an acquittal that bars double jeopardy under the protection of the Fifth Amendment. In *Blueford*, the defendant was charged with capital murder for causing the death of a one-year old infant. Charged in Arkansas, the statute under which he was charged, includes the highest charge of capital murder and all of the lesser-included charges of first-degree murder, manslaughter and negligent homicide[138].

Through the jury instructions, the judge instructed the jury that before moving on to a lesser-included offense, the jury must first find the defendant guilty or not guilty on the greater offense[139]. Additionally, the jurors were given a set of verdict forms which allowed for the jury to convict the defendant either of one, all or none of the crimes with which he was charged[140]. After the case was presented to the jury, the jury went back into their deliberation room. After deliberating for a few hours, the foreperson of the jury disclosed in open court that the jury was unanimous in its decision regarding finding Blueford not guilty on the two highest charges, but that they were deadlocked on manslaughter, and had not yet started a discussion regarding the negligent homicide charge[141]. The trial judge instructed the jury to continue to deliberate, but even after a prolonged deliberation, the jury was not able to come to a unanimous decision on the lesser two charges with which Blueford was charged[142]. When the jury returned to the courtroom after they failed to make a decision on the lesser two charges, the judge declared a mistrial.

After the mistrial decision, Arkansas requested a retrial, Blueford argued to the court that he was already acquitted of the capital murder and first degree murder charges, and therefore retrying him on these charges went against the double jeopardy clause of the Fifth

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[138] *Blueford* at 2049.
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.* at 2050.

Amendment[143]. The trial court denied Blueford's motion, and that decision was upheld by the Arkansas Supreme Court. The Supreme Court granted certiorari to resolve the issue of whether Blueford was acquitted of the first two charges, therefore barring a second trial on those charges under the double jeopardy clause of the Fifth Amendment[144]. The Court, in a 6-3 decision, held that because the jury was not permitted acquit on some charges but not others, and the fact that the jury did not renew their unanimous decision of not guilty on the higher two charges when they stated their continued state of deadlock, the double jeopardy clause did not bar a retrial. Justice Sotomayor, who was joined by Ginsberg and Kagan, authored a dissent outlining her reasoning, as explained through her three-prong system, that justice mandates that Blueford not be retried on the first two charges because that would violate the double jeopardy clause of the Fifth Amendment[145].

In her dissent, Sotomayor cited to numerous cases, of which four are highlighted below. The four highlighted cases that are cited are: *Arizona v. Washington*[146]; *United States v. Martin Linen Supply Co.*, a case in which the court granted certiorari to resolve the issue of the lower court which dismissed a case after the jury was unable to come to a decision after deliberating for seven days, under the Federal Rule of Criminal Procedure 29(c); *United States v. Jorn*[147], a case regarding the double jeopardy clause and whether it is applicable after a judge has ordered that a trial be aborted after it had commenced; and *Downum v. United States*[148], in which the Court granted certiorari in a case discussing double jeopardy protection after the second empaneling of a jury after a key prosecution witness was not available to testify before the first

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[143] *Id.*
[144] *Id.* at 2050.
[145] *Id.* at 2053-2060. (Sotomayor, J., dissenting)
[146] *Arizona v. Washington*, 434 U.S. 497 (1978).
[147] *United States v. Jorn*, 400 U.S. 470 (1971).
[148] *Downum v. United States*, 372 U.S. 734 (1963).

jury empaneled. Additionally, she stated two main reasons why the majority was wrong when they wrote their opinion, which are the primary reasons to her authoring the dissent.

Of the four cases highlighted, three of the cases are cited to in the first paragraph of her dissent[149]. The first case cited to is *Washington*, in which the Court decided a case that specifically addresses the issue of double jeopardy in regards to a jury nullification issue. The second case cited to in her dissent is *Martin Linen Supply Co.*, in which Sotomayor cited to the fact that an acquittal occurs when there is a resolution on some or all of the charges a defendant is charged with.[150] The opening paragraph also cites to *Jorn* in stating that it is improper for a trial judge to declare a mistrial before the jury has reached a decision on each of the charges with which the defendant is charged unless there is the consent of the defendant. This issue, Sotomayor argues was not present in *Blueford*, or a "manifest necessity." Citing to these three cases, Sotomayor enunciated that post acquittal, the double jeopardy clause directly prohibits a second trial,[151] and that in this case, the first trial resulted in an acquittal because it was a unanimous decision against guilt in regards to the top two charges[152]. Utilizing the cases, Sotomayor stated her two reasons why she was dissenting from the majority opinion.

The two primary reasons Sotomayor stated for dissenting from the majority opinion were that the examples the majority used to support their decision did not present the same facts as *Blueford*, specifically in regards to the open-court announcement by the foreperson that the jury had unanimously found the defendant not guilty of the greater two charges with which he was charged[153]. The second reason stated by Justice Sotomayor was that she disagrees with the factual basis that is employed by the majority that suggests the jury's deliberations could have

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[149] *Id.* at 2053.
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id. at 2057.*

happened in the manner that is being attested to by the majority.[154]

The last example of precedent that is cited to by Justice Sotomayor was when she cited to *Downum*, stating that when there is ambiguity in a decision rendered by a jury, that in adhering to the established precedent of the Court and the mandate of the Double Jeopardy Clause, the ambiguity is to be resolved in favor of the defendant[155].

Together, both through citing to case law directly speaking to the bounds and purview of the Fifth Amendment, Sotomayor demonstrated her continued adherence to fidelity in the law.

VI. CONCLUSION

Throughout her tenure on federal benches, Justice Sotomayor has upheld her three prong judicial theory. While every prong is not always utilized in every opinion, concurrence, or dissent, like her colleagues her fervor and resolve to maintain judicial neutrality demonstrated through her history on the bench. When deciding cases, when applicable she carefully examines the Constitution, applicable statutes and relevant case law. Additionally, as has been previously noted, it appears that at times she supplements her constitutional and case law analysis with her personal knowledge and experience in the criminal justice system. During her confirmation hearings, Justice Sotomayor described her judicial style, and while she sometimes adds to her style through utilizing her real world experience, her judicial style has not changed, making her one of the strongest voices on the Court.

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[154] *Id.*
[155] *Id.*